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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 417

HOWARD G. PINDER, SR., and HOWARD G. PINDER, JR.,
Petitioners,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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HOWARD G. PINDER, SR., and HOWARD G. PINDER, JR., your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above matter on July 6, 1962.

OPINION BELOW

The opinion of the court below (Appendix A, *infra*, pp. 1a-3a) has not yet been reported.

JURISDICTION

The judgment of the court below (Appendix B1, *infra*, p. 3a) was entered on July 6, 1962. A timely petition for rehearing was denied on August 9, 1962 (Appendix B2, *infra*, p. 4a). The jurisdiction of this Court is invoked under 28 U. S. C., § 1254(1).

QUESTIONS PRESENTED

1. Whether a judge assigned to service in another circuit, who disposed of numerous pretrial motions in a criminal case during the period of his assignment, has jurisdiction to sentence the defendants therein following the termination of that assignment, where the pleas on which the sentences were based were also entered before him following the termination of his assignment.

2. Whether the provision in 28 U. S. C. § 296 empowering an assigned judge to "decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters," authorizes such a judge, who has decided pretrial motions in a criminal case during the period of his assignment, thereafter to receive a change of plea and adjudge a valid sentence.

STATUTES INVOLVED

1. Section 292(c) of Title 28, U. S. C., provides as follows:

"**§ 292. District judges**

. . . . . .

"(c) The Chief Justice of the United States may designate and assign temporarily a district judge of one circuit for service in another circuit, either in a district court or courts of appeals, upon presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises."

2. Section 296 of Title 28, U. S. C., provides as follows:

"§ 296. Powers upon designation and assignment

"A justice or judge shall discharge during the period of his designation and assignment, all judicial duties for which he is designated and assigned. He may be required to perform any duty which might be required of a judge of the court or district or circuit to which he is designated and assigned.

"Such justice or judge shall have all the powers of a judge of the court, circuit or district to which he is designated and assigned, except the power to appoint any person to a statutory position or to designate permanently a depository of funds or a newspaper for publication of legal notices.

"A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters."

STATEMENT

The facts are not in dispute.

Petitioner Howard G. Pinder, Sr., hereinafter "Pinder Senior", was indicted in the Southern District of Florida on June 14, 1959, in a one ount indictment alleging conspiracy to evade and defeat wagering taxes in violation of 26 U. S. C. § 7201. On November 14, 1958, in the same District, an information had been filed against Howard G. Pinder, Jr., hereinafter "Pinder Junior", alleging failure to file a return, &c., in violation of 26 U. S. C. § 7203.

On July 31, 1959, these petitioners were arraigned before Judge Emett C. Choate of the Southern District of Florida, and severally pleaded not guilty.

Thereafter Judge William C. Mathes of the Southern District of California was designated by the Chief Justice of the United States "to perform the duties of District Judge and to hold a District Court in the Southern District of Florida during the period beginning August 17, 1959, and ending September 18, 1959, and for such further time as may be required to complete unfinished business."

On August 20, 1959, petitioners filed motions to dismiss, for a bill of particulars, for discovery and inspection, and for return of seized property and to suppress evidence.

These motions were brought on for hearing before Judge Mathes on September 15, 1959, during the period of his assignment; on that date he entered orders consolidating petitioners' cases with others, ruling on the motion for bill of particulars and for the return of seized property and the suppression of evidence, and granting the motion for discovery and inspection.

Following the termination of his assignment, Judge Mathes took other and further action in these cases. On September 23, 1959, he continued to December 14, 1959, the trial that had earlier been set for November 9, 1959. On December 15, he granted certain motions to *nolle pros.* several counts against co-defendants. On the same day, both petitioners withdrew their earlier pleas of guilty, and entered pleas of not guilty.

On December 28, 1959, more than three months after the termination of his assignment, Judge Mathes entered judgment. He sentenced the petitioner Pinder Senior to five years' confinement suspended, and placed him on probation for five years on condition of his paying a $10,000 fine within the probationary period. On the same day, Judge Mathes sentenced the petitioner Pinder Junior to one year's confinement suspended, and placed him on probation for five years on condition of his paying a $5000 fine within the probationary period. Appeals from these sentences were dismissed, *sub nom. Barnhill* v. *United States*, 279 F. 2d 105 (C. A. 5).

Thereafter, petitioners filed motions under 28 U. S. C. § 2255, based on the contention that, at the time of the entry of the pleas of guilty and the entry of the sentences, Judge Mathes was acting without authority because his designation had expired some months earlier.

The district court denied relief, on the ground that, when the challenged orders were entered, "Judge Mathes was completing unfinished business." Petitioners appealed;* the court below affirmed—though

* After notice of appeal was filed, Pinder Senior was remanded to custody for violating the terms of his probation.

without any citation of authority—"because these varied cases were in the category of 'unfinished business', and also because Judge Mathes' presence in the Southern District of Florida was still 'required to complete [other] unfinished business.' " A timely petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

This case presents a recurring problem that goes to the heart of the proper administration of business in the Federal courts, namely, the extent to which a visiting judge disposing of pretrial matters may so far regard subsequent proceedings in the same case as "unfinished business" or "applications for rehearing or further proceedings" so that he may continue to act therein on new and additional aspects of the case long after his assignment has expired. We think that the ruling below does violence to the governing statute, runs counter to the rationale of a controlling decision here, and, by disregarding the normal practice of United States district courts in criminal cases, introduces confusion and uncertainty in an area that should be sharply and clearly defined.

First. The normal meaning of the "unfinished business" that a visiting judge is empowered by his designation to complete after the period of his assignment expires must be the "applications for rehearing or further proceedings in such matters" of Section 296 (*supra*, p. 3), because, obviously, the Chief Justice's designation is limited by the terms of the statute.

What are "further proceedings"? Plainly, that category includes a later amendment of the decree entered, *United States* v. *Goldstein*, 271 Fed. 838 (C. A. 8), a motion for new trial, *Hicks* v. *United States &c.*

Emergency Fleet Corp., 14 F. 2d 316 (S. D. N. Y.), and, by the very terms of Section 296, an application for reargument. But new matters, even though arising in the same case, are beyond the visiting judge's powers; the classic example is *Frad* v. *Kelly*, 302 U. S. 312, where the visiting judge was held to have had no authority, after the termination of his period of service, to revoke the terms of probation that he had imposed. This Court said (pp. 316, 317) that "the Act * * * clearly does not contemplate that he shall decide any matter which has not been submitted to him within the designated district. * * * no authority is given to hear a new matter even though that new matter may arise in the same case."

Second. Under the normal practice in large multi-judge districts—the Southern District of New York, the Eastern District of Pennsylvania, the District of Columbia—the judge who hears pretrial motions in criminal matters is not normally the judge who tries the case. In actual fact, the motions judge hardly ever is the trial judge. It is only after all the motions are disposed of and the case is ready for trial that an assignment or calendar judge—who often is the Chief Judge of the District Court—assigns the case to a judge on the criminal side for trial. Except in the unusual case that is assigned to one particular judge for all purposes, and no such special assignment was made here, the motions judge never for one moment considers the subsequent trial of the case to be his unfinished business, any more than Judge Choate considered further proceedings here to be his "unfinished business" simply because he had presided at petitioners' original arraignment. Accordingly, one circuit has ruled that, where the visiting judge has

dismissed an indictment, and his ruling is thereafter reversed, the trial that then must be had can properly take place before another judge. *Hvass* v. *Graven*, 257 F. 2d 1 (C. A. 8), certiorari denied, 358 U. S. 835. Were it otherwise, a visiting judge ruling on a single pretrial motion would have a right at any time thereafter to return, in this instance from California to Florida, to conduct the trial, long after the expiration of his designation and assignment.

Third. While we cannot assert a square conflict of circuits, there is assuredly confusion in the reasoning of the several Courts of Appeals. Another circuit has held that, where the only regularly assigned judge was disqualified, the visiting judge during his period of assignment could set a trial date for a time beyond the termination of his assignment and then proceed to the trial as unfinished business. *United States* v. *Marachowsky*, 213 F. 2d 235 (C. A. 7), certiorari denied, 348 U. S. 826. Still another circuit ruled, though over strong dissent and with a number of narrow concurrences, that a visiting judge could start a trial the day before the commencement of his assigned period. *Leary* v. *United States*, 268 F. 2d 623 (C. A. 9).

Fourth. This field—the right of a judge to sit at all—is now in obvious confusion, although it is preeminently one where authority should be clearly and unmistakably ascertainable. It is hardly necessary to point out the obvious embarrassments flowing from the present state of the authorities: to counsel, who are necessarily hesitant to question any judge's right to act; to the visiting judge, who on occasion commits error on the assumption that his time to act is limited, as in *Thermo King Corporation* v. *White's Trucking Service, Inc.*, 292 F. 2d 668, 671-672 (C. A. 5); and to

the regularly assigned judges, who might regard as an interloper the visiting judge who overstays his time, on a par with the retired judges who refused to remain retired until legislatively prevented from resuming judicial duties on their own whim. Section 1 of the Act of May 11, 1944, c. 192, 58 Stat. 218, now 28 U. S. C. § 294(d); see 90 Cong. Rec. 3871; cf. *Steckel* v. *Lurie*, 185 F. 2d 921, 923-925 (C. A. 6), certiorari denied, 340 U. S. 953.

We think the time has come for these matters to be clarified, and for this Court to say whether "unfinished business" or "further proceedings" can be indefinitely extended virtually at will, in disregard alike of the usual procedure in the multi-judge districts, and of the limitations spelled out in *Frad* v. *Kelly*, 302 U. S. 312. We need only add that, *non constat* the view of the court below (*infra*, Appendix A, p. 2a), the content of "unfinished business" in the present context is a question of law, not a finding of fact where the trial court's conclusions carry special weight. The facts here are not and could not be disputed; what is in issue is the proper legal consequence of those facts.

Fifth. We mention, if only to show that it has not been overlooked, the usual defense in these cases, viz., the doctrine of the *de facto* judge. The court below, it is proper to point out, did not rely on that notion, and very properly not, because under the decisions of this Court the *de facto* doctrine is not available in a case like the present one. *Donegan* v. *Dyson*, 269 U.S. 49 (authority of former judge of the Commerce Court considered on collateral habeas corpus); *Frad* v. *Kelly*, 302 U. S. 312 (authority of assigned judge after termi-

nation of assignment considered on collateral habeas corpus). For here, very plainly, the scope of Section 296 "embodies a strong policy concerning the proper administration of judicial business." See *Glidden Company* v. *Zdanok*, 370 U. S. 530, 535-537.

CONCLUSION

The decision below condones and encourages a recurrent irregularity in the administration of justice. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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SEPTEMBER 1962.

APPENDIX A

OPINION BELOW

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19397

SUSIE BARNHILL, FREDI CLARKE, HOWARD PINDER, JR., and HOWARD PINDER, SR., *Appellants*,

versus

UNITED STATES OF AMERICA, *Appellee*.

Appeals from the United States District Court for the Southern District of Florida.

(July 6, 1962)

Before TUTTLE, Chief Judge, BELL, Circuit Judge, and CARSWELL, District Judge.

PER CURIAM: This appeal from denial of a Section 2255 motion to set aside judgments of conviction attack the authority of the trial judge, Honorable William C. Mathes, to preside and receive pleas of guilty and to sentence the appellants.

Judge Mathes, a District Judge from the Southern District of California, was designated by the Chief Justice of the United States "to perform the duties of District Judge and to hold a District Court in the Southern District of Florida during the period beginning August 17, 1959, and ending September 18, 1959, and for such further time as may be required to complete unfinished business."

Prior to the September 18, 1959 date, Judge Mathes entered several orders in connection with these several criminal cases. Such orders consolidated the three cases for trial, ruled on the defendants' motion for a bill of particu-

lars, granted defendants' motion of discovery and inspection, and ruled upon motions filed for the return of seized property and for suppression of evidence. Thereafter, on September 23rd he entered an order continuing the trial of the consolidated cases to November 14, 1959. On December 15th, Judge Mathes granted certain motions to nol pros several counts as against appellants in the pending cases. Thereupon, on the same day, the appellants withdrew pleas of not guilty and entered pleas of guilty. Thereafter, following pre-sentence investigations, on December 28, 1959, Judge Mathes in open court entered judgments against the defendants and imposed the sentences here appealed from. The defendants appealed and the appeals were dismissed by the Court of Appeals. Thereafter, the appellants filed the Section 2255 motions claiming that at the time of the entry of the pleas of guilty and the judgments of conviction and the entry of the sentences, Judge Mathes was acting without authority in that his designation had expired.

It will be noted that the term of the designation continues "for such further time as may be required to complete unfinished business." The extension of time beyond September 18th is not conditioned upon Judge Mathes performing some act in connection with a particular case. It is conditioned only upon the fact that time is required to complete some of his unfinished business within the district.

The trial court in the Section 2255 hearing held as a fact that at the time the challenged orders were entered, "Judge Mathes was completing unfinished business." Appellants do not attack this finding of fact; they merely contend that their cases were not "unfinished business" by reason of the fact that they had been assigned to Judge Mathes and he had entered upon the performance of his judicial duties with respect to them prior to September 18th.

We conclude that there is no merit in appellants' contention, both because these varied cases were in the category

of "unfinished business," and also because Judge Mathes' presence in the Southern District of Florida was still "required to complete [other] unfinished business."

The judgment is

AFFIRMED

APPENDIX B

JUDGMENTS BELOW

(1) Judgment below.

[Caption omitted]

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

July 6, 1962.

(2) Order denying rehearing.

Filed Aug. 9, 1962

On Petition for Rehearing and/or Alternatively, Motion to Stay Issuance of Mandate

[Caption omitted]

Before TUTTLE, Chief Judge, BELL, Circuit Judge and CARSWELL, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing and/or alternatively, motion to stay issuance of mandate, filed in the above styled and numbered cause be, and the same is, hereby DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 417

HOWARD G. PINDER, SR., AND HOWARD G. PINDER, JR., *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. 1a) is not yet reported. The order of the district court (R. 208-214) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1962 (Pet. 3a). A petition for rehearing was denied on August 9, 1962 (Pet. 4a). The petition for a writ of certiorari was filed on September 6, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a judge sitting in the jurisdiction by designation, until a specified date "and for such further time as may be required to complete unfinished business", had authority to accept petitioners' pleas of guilty and impose sentence after the date specified.

STATEMENT

In the United States District Court for the Southern District of Florida, petitioners were convicted, upon pleas of guilty, of violations of the wagering tax laws. On December 28, 1959, the petitioner Pinder, Sr. was sentenced to imprisonment for 5 years and the petitioner Pinder, Jr. to imprisonment of 1 year. In each case the execution of sentence was suspended and the petitioners placed upon probation for 5 years conditioned upon the payment of fines. An appeal urging grounds not here pertinent was dismissed (*sub nom. Barnhill* v. *United States*, 279 F. 2d 105 (C.A. 5)), and this Court denied a petition for a writ of certiorari (364 U.S. 824).

The present proceeding was initiated in 1961 by motion to set aside the convictions. The motion challenged the authority of the trial judge, Honorable William C. Mathes of the Southern District of California, to sit in the Southern District of Florida to receive petitioners' pleas of guilty and to pronounce sentence. The motion contended that at the time of the acceptance of the pleas the designation under which the judge sat by assignment of the Chief Justice of the United States, had expired. The facts as to this allegation, which are not in dispute, are as follows:

1. Judge Mathes was designated by Mr. Chief Justice Warren "to perform the duties of District Judge

and to hold a District Court in the Southern District of Florida during the period beginning August 17, 1959, and ending September 18, 1959, and for such further time as may be required to complete unfinished business" (R. 231).

On September 15, 1959, at a time when petitioners were awaiting trial on pleas of not guilty previously entered in three cases, Judge Mathes conduced a hearing on the petitioners' numerous pending motions. The judge ordered the three cases consolidated for trial, ruled upon motions for a bill of particulars, for the return of seized property and for the suppression of evidence, and granted a motion for discovery and inspection. On September 23, 1959, Judge Mathes, still sitting in the Florida District Court, entered an order continuing the trial of the consolidated cases. On December 15, 1959, he again ruled upon several motions of the petitioners filed on that day, and, on the same day, he granted the government's motions to dismiss several counts against petitioners in the pending cases. On December 15, 1959, petitioners withdrew pleas of not guilty and entered pleas of guilty, and the cases were referred for presentence investigation. Thereafter, on December 28, 1959, Judge Mathes in open court entered judgments against the defendants and imposed the sentences now attacked (See Order of the District Court dated November 16, 1961; R. 208-214).

2. In its order of November 16, 1961, denying petitioners' motion to set aside the judgments, the district court noted that in each instance where Judge Mathes acted with respect to petitioners after September 18, 1959, he was acting "while still sitting in this Court in Miami". The court held that Judge Mathes was at

least a judge *de facto*, if not a judge *de jure* and that petitioners, having recognized his authority when they entered their pleas and appealed from the judgment without raising a jurisdictional question, were in no position to challenge his authority collaterally. The court also held that Judge Mathes, after September 18, 1959, and until the judgments were entered on December 18, 1959, was completing "unfinished business;" and that the proceedings involving petitioners were, from the time of the entry of pleas of not guilty until final disposition, "unfinished business".

The court of appeals affirmed on the ground that Judge Mathes had authority to act at the time the challenged orders were issued, both because he was completing "unfinished business" as to petitioners' cases, and because his presence in the Southern District of Florida was still required to complete other unfinished business.

ARGUMENT

Petitioners contend that 28 U.S.C. 296[1] did not authorize Judge Mathes to enter the orders of conviction and sentence here questioned. That may or may not be. But there is no occasion for this Court to consider the question, for Judge Mathes' authority to dispose of these cases derived, not from this statute, but from the designation of the Chief Justice. The statute "gives an extension when the designation does not contain any,

[1] 28 U.S.C. 296 provides in pertinent part: "A justice or judge who has sat by designation and assignment in another district or circuit may, notwithstanding his absence from such district or circuit or the expiration of the period of his designation and assignment, decide or join in the decision and final disposition of all matters submitted to him during such period and in the consideration and disposition of applications for rehearing or further proceedings in such matters."

and does not affect the power of the Chief Justice to make the designation last ex proprio vigore * * * " (Judge Learned Hand in *United States* v. *Garsson*, 291 Fed. 646, 648 (D.C. S.D. N.Y.).

The designation here specifically provided that the term should run for "such further time as may be required to complete unfinished business." As the court below pointed out, Judge Mathes had authority to sit under this designation since his presence in Florida was required to dispose of these cases as well as other cases.

Moreover, even if the facts did not show, as they do, that Judge Mathes was a judge *de jure*, he would have been at least a judge *de facto*. See *Ball* v. *United States*, 140 U.S. 118; *McDowell* v. *United States*, 159 U.S. 596; *Ex parte Ward*, 173 U.S. 452; *Leary* v. *United States*, 268 F. 2d 623 (C.A. 9). Hence petitioners cannot challenge his authority in this collateral proceeding.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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